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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1926

No. 362

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 3, 1926

CERTIORARI GRANTED OCTOBER 11, 1926

(31,893)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 1170

LIGGETT & MYERS TOBACCO COMPANY, Petitioner,

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the Court of Claims

To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States :

Your petitioner, Liggett & Myers Tobacco Company, respectfully prays for a writ of certiorari to review the judgment of the Court of Claims of the United States in the case of Liggett & Myers Tobacco Company v. United States, No. D-549 (decided February 15, 1926, R. 40), under Section 240 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925.

QUESTION INVOLVED

Is the petitioner entitled to interest as a part of the measure of just compensation for private property taken by the United States for public use under the Acts of Congress approved March 4, 1917 (39 Stat. 1193) and June 15, 1917 (40 Stat. 182) ?

STATEMENT OF THE CASE

Petitioner sued in the Court of Claims to recover "the sum of \$59,610.34, together with just compensation or damages for the detention thereof" (R. 10), on account of the taking by mandatory orders of the Navy Department of tobacco and tobacco products, the property of petitioner, for which only partial payment had been made by the United States.

The Court of Claims, on February 15, 1926, entered judgment for the petitioner in the amount of \$59,610.34

(R. 40), the balance due and unpaid on the "fair market value" of the property requisitioned as aforesaid, but re-value" of the property requisitioned as aforesaid, but refused to allow interest on said amount, basing its refusal upon Section 177 of the Judicial Code of the United States (R. 39).

The tobacco and tobacco products for which just compensation is claimed by your petitioner were requisitioned by a mandatory order of the Navy Department, No. N-4128, dated August 26, 1918 (R. 11), and modifications thereof dated September 9, 1918 (R. 15), October 14, 1918 (R. 18), and November 22, 1918 (R. 20).

The above-mentioned order stated on its face that it was issued "pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, * * * Compliance with this order is obligatory, and no commercial orders will be allowed by you to interfere with the delivery herein provided for."

The order further provided that it "must be accepted and filled in any event and * * *. If order is placed under subparagraph (b), original is to be signed and returned." The order, by its express terms, was placed "under the conditions stated in subparagraph (b) (subparagraph (a)) is eliminated;" but later, when your petitioner refused to accept the prices fixed by the Navy Department, said Department attempted to modify the order "to apply under the terms and conditions of subparagraph A thereon, subparagraph B being eliminated" (R. 24).

During the period September 9, 1918 to January 23, 1919, your petitioner delivered to the Navy and Marine Corps at the times and places specified in said order and modifications thereof, tobacco and tobacco products in the amounts and quantities set forth at pages 22 and 23 of the Record, invoicing the same at five per centum less than the prevailing market prices paid to the claimant in an open and free market for precisely similar products of the same brands, and in similar quantities, by wholesale dealers in said products at the same time and place of delivery, the total invoice price being \$483,504. 30 (R. 23).

From time to time, between September 9, 1918 and November 23, 1918, petitioner was paid on account of said deliveries, amounts totaling \$423,893.96 (R., 34), leaving a balance due petitioner of \$59,610.34 (R., 34).

On or about December 4, 1920 the Navy Department notified petitioner that "the Navy has established * * * final prices for tobacco required under Navy Orders N-4128," which prices were lower than the amounts claimed by petitioner (R., 34).

Petitioner rejected and declined to accept as just compensation the prices set forth in the letter of the Navy Department of December 4, 1920 and so notified said Department on December 7, 1920 (R., 35).

Repeated appeals to the Navy Department for just and complete compensation for the materials requisitioned as aforesaid having been rejected by said Department, petitioner on August 4, 1924 filed its suit in the Court of Claims for the balance due it, with interest thereon (R., 1). The case was submitted January 26, 1926, on an agreed statement of facts, the testimony of Mr. C. W. Toms, Vice-President of petitioner, report of Commissioner Micou, claimant's exceptions to the Commissioner's report, and briefs of counsel.

The Court of Claims found for your petitioner and awarded judgment on February 15, 1926 in the amount of \$59,610.34, but refused to allow interest as a part of the measure of just compensation (R., 39).

THE STATUTES INVOLVED

The Act of Congress, approved March 4, 1917, (39 Stat. 1193), among other things, provided as follows:

"(a) * * * The words 'war material' shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. * * *."

"(b) That in time of War, or of national emergency arising prior to March 1st, 1918, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such an order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. * * *."

"(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The Act of Congress approved June 15, 1917 (40 Stat. 182), among things, provided as follows:

"The President is hereby authorized and empowered, within the limits of the amount herein authorized—

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person."

* * * * *

"(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United

States has or has not any contract or agreement with the owner or occupier of such plant."

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any * * * material, or owning, leasing, or operating any plant equipped for the * * * production of * * * material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient."

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: * * *"

"The word 'material' shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof."

REASONS FOR GRANTING THE PETITION

Your petitioner respectfully presents the following grounds upon which this writ of certiorari is sought:

(a) The decision of the Court of Claims in this case is contrary to and in conflict with the decisions of this Court in *Seaboard Air Line Ry. Co., v. United States*, 261 U. S. 299, 43 Sup. Ct. Rep. 354; *United States v. Benedict*, 261 U. S. 294, 43 Sup. Ct. Rep. 357; *United States v. Rogers, et al.*, 255 U. S. 163, 41 Sup. Ct. Rep. 281; *Brooks-Seanlon Corp. v. United States*, 265 U. S. 106, 44 Sup. Ct. Rep. 471; *Brown, et al., v. United States*, 263 U. S. 78, 44 Sup. Ct. Rep. 92; in all of which cases this Court held that, when payment is not made contemporaneously with the taking, interest should be added to the fair market value of the property requisitioned to make up the full measure of just compensation guaranteed by the Constitution of the United States.

(b) The decision of the Court of Claims denies to your petitioner the full measure of just compensation guaranteed to it by the Fifth Amendment of the Constitution of the United States, and the Acts of Congress under which the property was taken.

(c) The decision of the Court of Claims that petitioner's right to recover depended upon contract, express or implied, is untenable and in conflict with the weight of authority.

This Court in the *Seaboard Air Line Ry. Co.* case, *supra*, held that the owner's right to just compensation for property requisitioned for war purposes does not depend on a promise, express or implied, to pay, but such payment is a necessary condition of the taking.

(d) The Court of Claims erroneously decided that the property of petitioner was not requisitioned, but purchased under a contract.

The premises considered, your petitioner respectfully prays that a writ of certiorari be issued under the seal of the Court, directed to the Court of Claims of the United

States, and that to that end all necessary and proper proceedings may be had.

Respectfully submitted,

LIGGETT & MYERS TOBACCO COMPANY.

By C. W. TOMS, *Vice-President.*

HUMPHREYS & DAY,

Attorneys for Petitioner.

ADRIAN C. HUMPHREYS,

CHESTER A. GWINN,

Of Counsel.

(31,893)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 1170

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1926		

[fol. 1]

IN THE COURT OF CLAIMS

No. D-549

LIGGETT & MYERS TOBACCO COMPANY, Claimant,

v.

THE UNITED STATES OF AMERICA, Defendants

I. PETITION—August 4, 1924

To the Honorable the Court of Claims:

The Liggett & Myers Tobacco Company respectfully represents:

1. That Claimant is a corporation, organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at No. 212 Fifth Avenue in the City and State of New York:

2. That for a long time preceding the declaration of war with Germany on the 6th day of April, 1917, Claimant Company had been engaged in the manufacture and sale of tobacco and tobacco products, including cigarettes, smoking, plug and chewing tobacco of various kinds and brands, and remained so engaged after the declaration of War and continuously to the present time.

3. That the Act of Congress, approved March 4, 1917, (39 Stat. 1193) among other things, provided as follows:

(b) "That in time of War, or of national emergency arising prior to March 1st, 1918, to be determined by the President [fol. 2] by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or War material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such

an order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person."

(d) "That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition or take over any factory or part thereof, or any ships or War material in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by Section twenty-four, paragraph twenty, Section one hundred and forty-five of the Judicial Code."

4. That an Act of Congress, approved June 15, 1917, (940 Stat. 182) among other things, provided as follows:

"The President is hereby authorized and empowered, within the limits of the amount herein authorized

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of [fol. 3] the War, and which are of the nature, kind and quantity usually produced, or capable of being produced by such person.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take preference over all other orders and contracts placed with such person.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant, or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive same, such person

shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by Section twenty-four, paragraph twenty, and Section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time."

5. That on or about August 31, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., what purported to be Navy Order No. N-4128, dated August 26, 1918, purporting to be issued pursuant to the provisions of said Acts of Congress, above referred to. Said order on its face stated that compliance therewith was obligatory and that no commercial order should be allowed to interfere with the deliveries therein [fol. 4] provided for. A copy of said order is attached hereto, marked Exhibit A and made a part hereof.

6. That under said obligatory order or requisition, Claimant was required to deliver to the United States, as called for by the Officer in Charge, Provisions and Clothing Depot, Brooklyn, New York, the brands and quantities, whether more or less, of cigarettes, smoking, chewing and plug tobacco, stated in said Order.

7. That on September 11, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a modification, dated September 9, 1918, of Navy Order N-4128, requiring the claimant to comply with orders issued by the Quartermaster, Marine Corps, Washington, D. C., for the delivery of tobacco and tobacco products; upon the same terms and conditions as contained in said obligatory order. A copy of said modification is attached hereto, marked Exhibit B, and made a part hereof.

8. That on or about October 16, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a second modification of Navy Order N-4128, referring in terms to

(a) Navy Order N-4122, Liggett & Myers Tobacco Company,

(b) Letter from Officer in Charge, Pro. and Clo. Depot to S & A 8 October file 50976/18X with letter from Liggett & Myers Tobacco Company 7 October enclosed.

This modification of said Order called for additional quantities of tobacco and tobacco products, more or less, as required, upon the same terms and conditions as contained in said original obligatory order. Copy of said modification [fol. 5] is attached hereto, marked Exhibit C and made a part hereof.

9. That on or about November 25, 1918, Claimant received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a third modification of Navy Order N-4128, referring in terms to

(a) Navy Order N-4128, Liggett & Myers Tobacco Company,

(b) S & A requisition 409, P & C 8 November, Provisions Navy 1919-1920.

This modification of said Order called for the delivery of certain additional quantities of tobacco and tobacco products, more or less, as required during the period from December 1, 1918, to February 28, 1919, upon the same terms and conditions as contained in said original obligatory order. Copy of said modification is attached hereto, marked Exhibit D, and made a part hereof.

10. That the said tobacco and tobacco products covered by said order or requisition, and its modifications, constitute "materials" or "war materials" as contemplated by said Acts of Congress, above referred to, and that Claimant, under said Acts of Congress, and under the Constitution of the United States, should be paid just compensation therefor.

11. That Claimant complied with said obligatory order and modifications thereof and delivered, from time to time, from September 9, 1918 to January 23, 1919, the brands and quantities of tobacco and tobacco products as called for by shipping instructions of the Navy Department and Marine Corps, and as shown on the attached schedule,

marked Exhibit E, and made a part hereof; that Claimant has received on account of payment for the various brands and quantities of tobacco and tobacco products, delivered by it to the Navy Department and Marine Corps as called for in said Order and modification thereof, in accordance with the unit prices stated in said Order (Exhibit A), the sum of Four Hundred and Twenty-three Thousand, Eight Hundred and Ninety-three Dollars and Ninety-six cents (\$423,893.96); that Claimant protested against being required to accept said unit prices as just compensation for its said tobacco and tobacco products and Claimant further maintained and claimed as just compensation the difference between said unit prices and prices 5% less than the prevailing market prices to wholesale dealers in said products at time and place of delivery, plus interest at six per centum per annum from date of delivery until paid.

12. That on or about December 4, 1920, the President of the United States, in accordance with, and subject to, the provisions of the Acts of Congress above referred to, determined just compensation for Claimant's tobacco and tobacco products delivered to the Navy Department and Marine Corps, to be as shown in a letter from the Bureau of Supplies and Accounts of the Navy Department, Washington, D. C., dated December 4, 1920, which purports to contain a final price determination to apply to tobacco and tobacco products furnished pursuant to Navy Order N-4128 and modifications thereof. A copy of said letter is attached hereto, marked Exhibit F, and made a part hereof.

Said letter, among other things, contains the following statements:

"Based on the Federal Trade Commission's report and with the concurrence of the Army and Marine Corps, the [fol. 7] Navy has established the following final prices, delivered to the Navy and Marine Corps, under Navy Order N-4128 and this Navy Order is hereby modified to apply under the terms and conditions of sub-paragraph (a) thereon, sub-paragraph (b) being eliminated."

Said letter further contained what purported to be a statement of account between Claimant and the Navy Department, showing an alleged balance due the Navy Depart-

ment, including the Marine Corps, of Four Thousand, Nine Hundred and Sixty-eight Dollars and Forty-four cents (\$4,968.44), and requested that check for said alleged balance should be mailed to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., together with the original of said letter signed as satisfactory, or not satisfactory in the space provided therefor. Said letter also contained the following statement:

"If the final prices herein fixed as just compensation are not satisfactory, claim should be made for the additional amount desired, in the manner prescribed by law as quoted in the original Navy Order."

13. That the final prices stated in the said letter, dated December 4, 1920, have been determined by the President of the United States to be just compensation for the several brands and quantities of tobacco and tobacco products delivered by the Claimant to the Navy Department and Marine Corps; that the said compensation so determined by the President of the United States was and is unsatisfactory to Claimant and does not constitute just compensation; that under the Constitution of the United States, and under the Acts of Congress referred to herein, Claimant is entitled to just compensation for said several brands and [fol. 8] quantities of tobacco and tobacco products; that just compensation therefor would be the market price at the time and place of delivery, plus interest at six percentum per annum from date of delivery until paid; that Claimant is, however, asking as just compensation at time of taking the unit prices shown on the schedule attached hereto, and made a part hereof, marked Exhibit E, which said unit prices are, and were five per cent less than the prevailing market prices paid to the Claimant in an open and free market for precisely similar products of the same brands, and in similar quantities, by wholesale dealers in said products at the same time and place of delivery and that Claimant, after the declaration of War against Germany on April 6, 1917, and prior to the receipt of the obligatory Order No. N-4128 dated August 26, 1918, sold large quantities of tobacco and tobacco products to the United States for the use of the Army and Navy at prices uniformly five per cent less than the lowest prevailing prices to wholesale dealers in said products.

14. That Claimant corporation and its officers are citizens of the United States, and have at all times borne true allegiance to the Government of the United States, and have never in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States; that Claimant is the owner of this claim, and no transfer or assignment thereof, or any part thereof, or interest therein, has been made; that no action other than as aforesaid has been had on this claim in Congress, or in any of the Departments or Bureaus of the United States Government.

15. That the quantities of materials shipped by Claimant to defendants were originally billed at \$483,504.30; said [fol. 9] sum represents the just compensation at the time of taking, figured on the quantities of materials actually delivered to and received by the defendants at the unit prices shown by Exhibit E hereof; that a further sum which, if added to the amount already paid to Claimant, will make up such amount as will be just compensation, is the sum of \$59,610.34, plus interest at six per centum per annum from date of delivery until paid; that the defendants are justly indebted to the said Claimant in the sum hereinbefore shown of \$483,504.30, less the payments made by defendant and alleged in paragraph 1 hereof aggregating \$423,893.96, leaving a balance now due and unpaid of \$59,610.34 plus interest at six per centum per annum from date of delivery until paid.

This petitioner is entitled to just compensation which is the monetary equivalent of its property as of the time of the taking or requisitioning thereof. Payment in full not having been made at the time of taking petitioner avers that its right to just and full compensation as of the date of the taking, requires the allowance of compensation or damages for delay in payment.

Petitioner avers that by reason of such delay in payment, it is entitled to compensation on the amount of claim hereinbefore set forth at the rate of six per centum per annum, and that said rate of six per centum per annum is a fair and reasonable value of the use of money during the period covered by the said claim.

Petitioner avers that if allowed all just credits and offsets there remains due and unpaid to it from the defendant a

balance of just compensation, and that it is justly entitled to the sum of \$59,003.30, from the United States, together with just compensation or damages for the detention thereof measured at the rate of six percentum per annum on the amount due for each delivery from the respective dates of [fol. 10] deliveries up to the date of payment on account thereof and thereafter on the balance due thereon to the date of payment.

Wherefore, your petitioner demands judgment against the defendant in the sum of \$59,610.34 together with just compensation or damages for the detention thereof, as aforesaid.

Respectfully submitted, Liggett & Myers Tobacco Company, by C. C. Dula, President.

Duly sworn to by C. C. Dula. Jurat omitted in printing.

[fol. 11] CLAIMANT'S EXHIBIT A TO PETITION

Navy Department, Bureau of Supplies and Accounts,
Washington, D. C.

Navy Order Number N-4128.
Bureau of Supplies & Accounts.

26 August, 1918.

Liggett & Myers Tobacco Co., 212 Fifth Ave., New York,
N. Y.

Sir:

1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph (b) (subparagraph (a) is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid [fol. 12] the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

2. Deliveries are required to be made, in whole or in part, as soon as possible and before the expiration of the time limit as stated herein.

Delivery will be made to As directed by Officer-in-Charge within as stated below, (Pro. & Clo. Depot, Brooklyn, N. Y.) the time allowed for deliveries counting from — — —, — — —.

3. Dealers' bills are to be sent to Officer-in-Charge, Pro. & Clo. Depot, Brooklyn, N. Y., who is authorized to prepare vouchers in payment.

(a) In forwarding bills, the original bill must bear the following certificate: "Prices are certified to be those as stated in Navy Order No. —; payment not received."

4. If this order is based on deliveries f. o. b. works, your material can not be shipped except under orders from the naval inspecting officer for your district, and then only under a Government bill of lading to be furnished by that [fol. 13] officer, in which case transportation charges must not be prepaid.

5. The conditions appearing on the reverse side hereon are made part of this order.

N-4128.

Reference: P and C letter 30 July 1918, File 46231/BC. P and C letter 21 August 1918, File 47365/18C. Approp. Prov. Navy 1919-20.

- 30,000 Plugs "Star" Brand Chewing Tobacco, each plug to weigh 16 ounces.
- 150,000 Tins "Velvet" Brand Smoking Tobacco, packed 2 ounces net per tin.
- 287,500 Packages "Chesterfield" Brand Cigarettes, packed 20 cigarettes per package.
- 1,000,000 Packages "Piedmont" Brand Cigarettes, packed 16 cigarettes per package.
- 800,000 Packages "Fatima" Brand Cigarettes, packed 16 cigarettes per package.

These quantities are the estimated Navy requirements for period to 1 December, 1918. The Navy does not guarantee to purchase the above stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above stated period. Shipment will be made only on receipt of an order from the Officer-in-Charge, Provisions & Clothing Depot, based on this Navy Order.

It is further stipulated that any proportion of the Navy's requirements will be furnished Tax Paid or In Bond, as directed by the Officer-in-Charge, Provisions & Clothing Depot.

Domestic or Export Cases are to be supplied ordered by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

Inspection at point of delivery.

Provisional Prices

"Star" Brand Chewing Tobacco:

Domestic Tax Paid, \$.49 net per plug, f. o. b. destination.
In Bond, \$.38 net per plug, f. o. b. factory.

[fol. 14] "Velvet" Brand Smoking Tobacco:

Domestic Tax Paid, \$.09 net per tin, f. o. b. destination.
In Bond, \$.075 net per tin, f. o. b. factory.

"Chesterfield" Brand Cigarettes:

Domestic Tax Paid, \$.09 net per package, f. o. b. destination.
In Bond, \$.055 net per package, f. o. b. factory.

"Piedmont" Brand Cigarettes:

Domestic Tax Paid, \$.07 net per package f. o. b. destination.
In Bond, \$.04 net per package, f. o. b. factory.

"Fatima" Brand Cigarettes:

Domestic Tax Paid, \$.10 net per package, f. o. b. destination.
In Bond, \$.07 net per package, f. o. b. factory.

Domestic Tax Paid shipments to be made on prepaid Commercial Bills of Lading.

In Bond shipments to be made on Commercial Bills of Lading, freight prepaid and added to the invoice as an additional item.

War Tax exemption certificates will be furnished by the Officer-in-Charge and are to be used on all shipments.

Payments will be made only by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

MEMO.—See S and A File 319-8.

Contractor's Copy.

By direction of the Secretary of the Navy.

(Signed) S. McGowan, Paymaster General of the Navy.

The above order is accepted subject to the conditions in subparagraph (b) above.

Liggett & Myers Tobacco Co., by C. W. Toms, Vice-President.

Witness: ———

[fol. 15] CLAIMANT'S EXHIBIT B TO PETITION

In reply, please refer to No. N-4128—(P).

Navy Department (Bureau of Supplies and Accounts),
Washington, D. C.

9 September, 1918.

Liggett & Myers Tobacco Co., 212 Fifth Avenue, New York,
N. Y.:

Subject: Modification of Navy Order.

Reference: Navy Order N-4128, Liggett & Myers Tobacco Co., New York, N. Y.

SIRS: Navy Order N-4128 is hereby modified to include the following paragraph:

“Any orders issued by the Quartermaster, Marine Corps, Washington, D. C. for the brands of tobacco specified in this Navy Order are to be executed and billed at the prices stated thereon. Shipping instructions will be issued and payment will be made by the Quartermaster, Marine Corps, Washington, D. C.”

Respectfully, (Signed) Samuel McGowan, Paymaster General of the Navy.

Goods Ordered on Account of Navy Order No. 4128

Date ordered	Star	Velvet	Chest.	Piedmont	Fatima
Aug. 30 (Navy)	25,000 lbs. I. B.	100,000 Tins. 2 oz. I. B.	50,000 Pkgs. 20s I. B. 50,000 Pkgs. 20s T. P.	50,000 Pkgs. 16s I. B. 50,000 Pkgs. 16s T. P.	50,000 Pkgs. 20s I. B. 50,000 Pkgs. 20s T. P.
Sept. 18 (Navy)		10,000 Tins. 17/8 oz. T. P.	50,000 Pkgs. 20s T. P.	50,000 Pkgs. 16s T. P.	50,000 Pkgs. 20s T. P.
Sept. 25 (Navy)	2,500 lbs. T. P.	25,000 Tins. 17/8 oz. T. P.	50,000 Pkgs. 20s T. P.	200,000 Pkgs. 16s T. P.	200,000 Pkgs. 20s T. P.
Oct. 9 (Navy)	1,250 lbs. T. P. 1,250 lbs. I. B.	7,500 Tins. 2 oz. T. P. 7,500 Tins. 2 oz. I. B.	43,750 Pkgs. 20s T. P. 43,750 Pkgs. 20s I. B.	375,000 Pkgs. 20s T. P. 375,000 Pkgs. 20s I. B.	300,000 Pkgs. 20s T. P. 300,000 Pkgs. 20s I. B.
Oct. 22 (Navy)			200,000 Pkgs. 20s T. P.		75,000 Pkgs. 20s T. P.
Sept. 12 (Marine)	4,000 lbs. T. P. 2,400 lbs. I. B. 1,500 lbs. T. P.				

Goods Ordered on Account of Navy Order No. 4128—Cont'd

Date ordered	Star	Velvet	Chest.	Piedmont	Fatima
Oct. 17 (Marine)	.....	.....	62,500 Pkgs. 20s T. P.	75,000 Pkgs. 20s T. P.	37,500 Pkgs. 20s T. P.
			62,500 Pkgs. 20s T. P.	75,000 Pkgs. 20s T. P.	37,500 Pkgs. 20s T. P.
			18,750 Pkgs. 20s I. B.	27,500 Pkgs. 20s I. B.	12,500 Pkgs. 20s I. B.
			18,750 Pkgs. 20s T. P.	27,500 Pkgs. 20s T. P.	12,500 Pkgs. 20s T. P.
			3,750 Pkgs. 20s I. B.	7,500 Pkgs. 20s I. B.	3,750 Pkgs. 20s I. B.
Total	37,900 lbs.	150,000 Tins.	653,750 Pkgs.	962,500 Pkgs. 20s	1,128,750 Pkgs.
				350 000 Pkgs. 16s	
<hr/>					
Navy Order #4128 called for	30,000 lbs.	150,000 Tins.	287,500 Pkgs. 20s	1,312,500 Pkgs. 1,000,000 Pkgs. 16s	800,000 Pkgs. 16s

[fol. 17]

Piedmont, 16s

	Tax paid		In bond	
	Per pkg.	Per M	Per pkg.	Per M
Our Price.....	.077	4.8125	.0451	2.81875
Navy Price.....	.07	4.375	.04	2.50
		<u>.4375</u>		<u>.31875</u>

Chesterfields, 20s

	Tax paid		In bond	
	Per pkg.	Per M	Per pkg.	Per M
Our Price.....	.1026	5.13	.06278	3.139
Navy Price.....	.09	4.50	.055	2.75
		<u>.63</u>		<u>.389</u>

Fatima, 16s

	Tax paid		In bond	
	Per pkg.	Per M	Per pkg.	Per M
Our Price.....	.10902	6.81375	.07715	4.821875
Navy Price.....	.10	6.25	.07	4.375
		<u>.56375</u>		<u>.446875</u>

Velvet, 2 oz.

	Tax paid		In bond	
	Per pkg.	Per lb.	Per pkg.	Per lb.
Our Price.....	.1026	.8208	.0886	.7088
Navy Price.....	.09	.72	.075	.60
		<u>.1008</u>		<u>.1088</u>

Star

	Tax paid		In bond	
Our Price.....	.5472	per lb.	.42425	per lb.
Navy Price.....	.49		.38	
	<u>.0572</u>		<u>.04425</u>	

[fol. 18] CLAIMANT'S EXHIBIT C TO PETITION

Navy Department, Washington, D. C.

N-4128—PPH.

14 October, 1918.

Liggett & Myers Tobacco Company, 212 Fifth Avenue, New York, N. Y.

Subject: Modification of Navy Order N-4128.

References: (a) Navy Order N-4128—Liggett & Myers Tobacco Company. (b) Letter from Officer-in-Charge, Pro. & Clo. Depot, to S and A, 8 October, file 50976/18X, with letter from Liggett & Myers Tobacco Co., 7 October, enclosed.

SIRS: In accordance with information set forth in reference (b) Navy Order N-4128 is hereby modified to provide for the delivery and acceptance of the following size packages of cigarettes at provisional prices stated:

“Fatima” Brand Cigarettes, packed 20 cigarettes per package.

“Piedmont” Brand Cigarettes, packed 10 and 20 cigarettes per package.

Provisional Prices

“Fatima” Brand Cigarettes:

Domestic Tax Paid, \$.125 net per package, f. o. b. destination.

In Bond, \$.085 net per package, f. o. b. factory.

“Piedmont” Brand Cigarettes:

Domestic Tax Paid (10's), \$.04 net per package, f. o. b. destination; (20's), \$.085 per package, f. o. b. destination.

In Bond (10's), \$.025 net per package, f. o. b. factory; (20's), \$.05 net per package, f. o. b. factory.

This modification will not have any bearing on the cigarettes already shipped in accordance with the original Navy [fol. 19] Order. It is further understood that the Navy will not consent to a further modification of this Navy Order due to changes in the style of packages that might be

contemplated by the Liggett & Myers Tobacco Company during the existence of this Navy Order.

14 October, 1918. N-4128-PPH.

The original of this letter is to be signed and witnessed in the spaces below and returned to the bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Respectfully, Samuel McGowan, Paymaster General of the Navy.

(Supplementary Clause)

Navy Order N-4128 is hereby accepted as modified above. Liggett & Myers Tobacco Co., by (Signed) C. W. Toms, Vice-President.

Witness: (Signed) O. B. Arthur.

CC to contractor, officer-in-charge Fleet Supply Base, S. Brooklyn, N. Y., U. S. Marine Corps, Quartermaster, Mr. Esberg, War Industries Board, Disbursing Division, Accounting Division, Auditor for the Navy, Navy Order Section.

[fol. 20] CLAIMANT'S EXHIBIT D TO PETITION

In reply, please refer to No. N-4128-PP.

Navy Department (Bureau of Supplies and Accounts),
Washington, D. C.

22 November, 1918.

Liggett & Myers Tobacco Co., 212 Fifth Avenue, New York,
N. Y.

Subject: Modification Navy Order N-4128.

Reference: (a) Navy Order N-4128, Liggett & Myers Tobacco Co.; (b) S and A requisition 409 P and C 8 November, Provisions Navy 1919-1920.

SIRS: Navy Order N-4128 is hereby modified to provide for delivery of the following additional quantities of tobacco, more or less, as required during period from 1 December, 1918, to 28 February, 1919:

75,000 plugs Star Chewing Tobacco, each plug to weigh 16 oz.

400,000 packages Chesterfield Cigarettes, packed 20 cigarettes per package.

2,000,000 packages Piedmont Cigarettes, packed 20 cigarettes per package.

1,000,000 packages Fatima Cigarettes, packed 20 cigarettes per package.

The above quantities are estimated only and shipment is to be made only on receipt of order for Officer-in-Charge, Fleet Supply Base, South Brooklyn, N. Y.

All conditions stipulated in the original Navy Order, or any modification authorized heretofore, are likewise applicable to this modification. All shipments are to be billed at the provisional prices specified in the original Navy Order, or any modification made subsequent thereto.

It is requested that the original of this letter, modifying the above Navy Order be signed in the spaces below [fol. 21] and returned to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Respectfully, Samuel McGowan, Paymaster General
of the Navy.

(Supplementary Clause)

Navy Order N-4128 as modified above is hereby accepted.

Liggett & Myers Tobacco Co., (Signed) by C. W.
Toms, Vice-President.

Witness: (Signed) C. B. Arthur.

CC to contractor, officer in charge Fleet Supply Base, So. Brooklyn, N. Y., Accounting Division, Auditor of Navy, Navy Order Section.

CLAIMANT'S EXHIBIT E TO PETITION
Statement of Account on Navy Contract #4128, Delivered to Navy Department

In Bond						
Date of invoice	I. & M. Invoice No.	Brand	Quantity	Price	Amount	
9/ 9/18	X-614	Fatima	20s	096976	\$4,883 34	
10/29/18	X-678	"	20s	096976	29,092 80	
9/13/18	X-613	Chesterfield	20s	0627776	3,192 80	
10/28/18	X-677	"	20s	062776	2,778 28	
11/14/18	X-700	"	20s	062776	3,175 17	
9/18/18	X-615	Piedmont	16s	0451	2,251 39	
10/31/18	X-679	"	20s	056376	21,174 83	
11/22/18	X-699-A	"	20s	062776	18,832 80	
12/13/18	X-699-B	"	20s	062776	7,533 12	
12/18/18	X-699-C	"	20s	062776	11,299 68	
9/14/18	X-163	Velvet	2 oz.	0886	9,120 63	
10/31/18	X-206	"	2 oz.	0886	650 68	
11/15/18	X-214	"	2 oz.	0886	1,835 96	
9/30/18	X-162	Star	16 oz.	42425	10,858 56	
11/ 6/18	X-205	"	16 oz.	42425	560 79	
11/22/18	X-215	"	16 oz.	42425	2,185 11	
					<hr/>	\$129,425 94

Statement of Account on Navy Contract #4128, Delivered to Navy Department—Cont'd

Tax Paid

Date of invoice	L. & M. invoice No.	Brand	Quantity	Price	Amount
9/18/18	D-521	Fatima	20s	1368	6,840 00
9/30/18	D-533	"	20s	1368	
		Piedmont	16s	077	10,697 53
10/11/18	D-526	Fatima	20s	1368	27,357 74
10/31/18	D-537	"	20s	1368	41,034 06
11/14/18	D-540	"	20s	1368	10,187 72
		{ Fatima	20s	1368	
11/30/18	D-566	{ Chesterfield	20s	1026	38,610 91
		{ Piedmont	20s	1026	
		Chesterfield	20s	1026	
9/16/18	D-520	"	1,000,000	1026	5,130 00
9/24/18	D-524	"	1,000,000	1026	5,130 00
10/3/18	D-525	"	1,000,000	1026	5,128 89
10/25/18	D-536	"	875,000	1026	4,487 43
10/29/18	D-539	"	4,000,000	1026	20,513 68
11/14/18	D-548	"	1,000,000	1026	5,128 49
1/23/19	D-576	"	3,500,000	1026	17,955 00
9/23/18	D-522	Piedmont	798,720	077	3,843 84
10/9/18	D-527	"	3,196,800	077	15,382 17
11/6/18	D-538	"	2,184,000	09525	10,401 30
11/8/18	D-538	"	5,304,000	09525	25,260 30
11/16/18	D-557	"	5,990,400	1026	30,730 75

9/24/18	D-179	Velvet	.....	1 7/8 oz.	9,936	Tins	1026	1,019 43
10/ 8/18	D-180	"	.....	1 7/8 oz.	25,056	"	1026	2,567 91
10/31/18	D-187	"	.....	2 oz.	7,344	"	10944	802 87
11/15/18	D-240	"	.....	2 oz.	19,872	"	10944	2,172 46
10/ 4/18	D-181	Star	.....	16 oz.	2,496	lbs.	5472	1,365 05
10/20/18	D-186	"	.....	16 oz.	1,248	"	5472	682 58
11/18/18	D-241	"	.....	16 oz.	4,992	"	5472	2,730 04
11/23/18	D-261	"	.....	16 oz.	11,472	"	5472	6,265 00
								<hr/>
Total deliveries to Navy Department								\$301,425 15
								\$430,851 09

Date of Invoice	L & M Invoice No.	In Bond			Amount
		Brand	Quantity	Price	
11/22/18	{X-664	Fatima	75,000	096976	\$1,021.89
		Chesterfield	75,000	062776	
		Piedmont	150,000	056376	
10/31/18	X-665	Fatima	250,000	096976	1,212.20
10/31/18	X-666	Chesterfield	375,000	062776	1,177.05
11/6/18	X-667	Piedmont	552,000	056376	1,555.98
9/30/18	X-175	Star	2,432 lbs.	42425	1,075.91
					<hr/>
					<hr/>
					<hr/>
					\$6,043.03

Tax Paid				
11/9/18	D-533	Piedmont	1,497,600	09525
11/15/18	D-527	Fatima	750,000	1368
11/6/18	{D-530	"	250,000	1368
		Chesterfield	375,000	1026
		Piedmont	550,000	09525
11/12/18	D-531	Fatima	750,000	1368
10/22/18	D-528	Chesterfield	1,250,000	1026
10/24/18	D-532	"	1,250,000	1026
11/9/18	D-529	Piedmont	1,497,600	09525
				\$7,132.32
				5,130.00
				6,253.13
				5,130.00
				6,412.50
				6,412.50
				7,132.32

9/20/18	D-176	Star	16 oz.	1,488 lbs.	5472	814 23
9/21/18	D-175	"	16 oz.	4,008 "	5472	2,193 18

Total deliveries to Marine Corps	\$46,610 18
	\$52,653 21

Summary

Total deliveries to Navy Department	\$430,851 09
Total deliveries to Marine Corps	52,653 21
Grand total	\$483,504 30

[fol. 24] CLAIMANT'S EXHIBIT F TO PETITION

N-4128—PO-R. 100-17.

Navy Department (Bureau of Supplies and Accounts),
Washington, D. C.

4 December, 1920.

Ligget & Myers Tobacco Company, 212 Fifth Avenue, New
York City.

Subject: Final price determination.

Reference: Navy Order N-4128.

SIRS: Based on the Federal Trade Commission's Report, and with the concurrence of the Army and Marine Corps, the Navy has established the following final prices for tobacco required under Navy Order N-4128, and this Navy Order is hereby modified to apply under the terms and conditions of subparagraph A thereon, subparagraph B being eliminated:

		Final price
Chesterfield	20 Dom.	\$.09322
	20 Exp.	.05146
Fatima	20 Dom.	.12019
	20 Exp.	.07870
Piedmont	20 Dom.	.08707
	20 Exp.	.04403
	16 Dom.	.06926
	16 Exp.	.03453
Velvet	17 $\frac{1}{8}$ oz. Dom.	.08450
	17 $\frac{1}{8}$ oz. Exp.	.07464
	2 oz. Dom.	.08666
	2 oz. Exp.	.07626
Star	16 oz. Dom.	.54011
	16 oz. Exp.	.40486

The above final prices are all f. o. b. factory. For any shipment on which freight was paid by the company, credit for the actual amount paid will be allowed by the Navy on presentation of properly substantiated invoices. These [fol. 25] final prices have been determined on a basis of cost plus a reasonable return on investment. In determining costs, the cost of leaf tobacco has been computed at the

average price of stock on hand, all selling expense and various minor items, such as donations, excess profits, taxes, etc., being eliminated. Profit on the above cost of production has been allowed to permit of a return of 10 per cent on capital investment, including common and preferred stock but eliminating outside investments and intangibles, such as good will, etc.

On this basis the records of the Navy show the account of the Liggett & Myers Tobacco Company under this Navy Order to stand as follows:

Quantity Delivered to Navy

		Provis. price paid	Total paid	Price now fixed	Total
34,992	Velvet	17 1/8 oz. Dom.	\$3,149 28	\$08450	\$2,956 82
27,216	"	2 oz. Dom.	2,449 44	08666	2,358 54
127,216	"	2 oz. Exp.	9,541 20	07626	9,701 49
700,920	Piedmont	20 Dom.	59,578 20	08707	61,029 10
975,600	"	20 Exp.	48,780 00	04403	42,955 67
299,832	"	16 Dom.	20,988 24	06926	20,766 36
49,920	"	16 Exp.	1,996 80	03453	1,723 74
779,530	Chesterfield	20 Dom.	70,157 70	09322	72,667 79
143,750	"	20 Exp.	7,906 25	05146	7,397 37
816,400	Fatima	20 Dom.	958 00	12019	92,113 62
50,000	"	20 Dom.	5,000 00	12019	6,009 50
300,000	"	20 Exp.	25,500 00	07870	23,610 00
50,000	"	20 Exp.	3,500 00	07870	3,935 00
20,202	Star	16 oz. Dom.	9,898 98	54011	10,911 30
31,296	"	16 oz. Exp.	11,892 48	40486	12,670 50
Amount due Navy					\$370,806 80
					5,331 77
					<u>\$376,138 57</u>

Quantity Delivered to Marine Corps

177,260	Piedmont	20 Dom	\$ 085	\$15,066 50	\$ 08707	\$15,434 03
35,100	"	20 Exp	05	1,755 00	04403	1,554 25
143,750	Chesterfield	20 Dom	09	12,937 40	09322	13,400 38
22,500	"	20 Exp	055	1,237 50	05146	1,157 85
[fol. 26]						
87,500	Fatima	20 Dom	125	10,937 50	12019	10,516 63
16,250	"	20 Exp	085	1,381 25	07870	1,278 87
5,508	Star	16 oz. Dom	49	2,698 92	54011	2,974 93
2,432	"	16 oz. Exp.	38	924 16	40486	984 62
				<hr/>		
Amount due Company				\$46,938 23		
				363 33		
				<hr/>		
				\$47,301 56		
				<hr/>		
				\$47,301 56		

If the deliveries stated in the above tabulation do not agree with deliveries shown by the company's records, it is requested that the Navy be advised in order that all questions of fact in this respect may be reconciled.

From the amount of \$4,968.44, which is the amount due the Navy on deliveries made to the Navy less the amount due the company on deliveries made to the Marine Corps, is to be deducted any freight prepaid by the company. Check for the balance should be mailed to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., together with the original of this letter signed as satisfactory or not satisfactory in the spaces provided below.

If the final prices herein fixed as just compensation are not satisfactory, claim should be made for the additional amount desired in the manner prescribed by law as quoted in the original Navy Order.

Respectfully, Samuel McGowan, Paymaster General
of the Navy.

Navy Order N-4128 is hereby accepted subject to the conditions of subparagraph A of the original Navy Order. The prices fixed above as final are satisfactory.

By ———.

Witness: ———.

—————

[fol. 27] II. GENERAL TRAVERSE—October 4, 1924

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

—————

III. ARGUMENT AND SUBMISSION

On January 26, 1926, this case was argued and submitted on merits by Mr. C. A. Gwinn, for plaintiff, and by Mr. D. E. Rorer, for the defendant.

[fol. 28] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Filed February 15, 1926

This case having been heard by the Court of Claims upon a stipulation of facts signed on behalf of the United States by Mr. Herman J. Galloway, Assistant Attorney General, and by Mr. Adrian C. Humphrey for the plaintiff, and the evidence, the court makes the following

SPECIAL FINDINGS OF FACT

I

Plaintiff, The Liggett & Myers Tobacco Company, is a corporation organized and existing under the laws of the State of New Jersey, having an office in the city and State of New York.

II

For a long time and before the war with Germany the plaintiff had been engaged in the manufacture and sale of tobacco products, including cigarettes, smoking, plug, and chewing tobacco of various kinds and brands, and continued in said business during said war and has been, and is now, engaged in that business.

III

On or about the 26th day of August, 1918, and bearing that date, a paper designated as Navy order No. N-4128 was issued out of the Bureau of Supplies and Accounts of the Navy Department at Washington addressed to the plaintiff at 212 Fifth Avenue, New York. The said order was upon a printed form in use in the said bureau, with blanks filled in by the typewriter, and is in words and figures as follows:

“1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subpara-

graph (b) (subparagraph (a) is eliminated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the de-[fol. 29] livery herein provided for.

“(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

“(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

“(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

"2. Deliveries are required to be made, in whole or in part, as soon as possible and before the expiration of the time limit as stated herein. Delivery will be made to As directed by Officer-in-Charge, Pro. & Clo. Depot, Brooklyn, N. Y., within — as stated below —, the time allowed for deliveries counting from — —, —.

"3. Dealers' bills are to be sent to Officer-in-Charge, Pro. & Clo. Depot, Brooklyn, N. Y., who is authorized to prepare vouchers in payment.

"(a) In forwarding bills, the original bill must bear the following certificate: 'Prices are certified to be those as stated in Navy Order No. —; payment not received.'

"4. If this order is based on deliveries f. o. b. works, your material can not be shipped except under orders from the naval inspecting officer for your district, and then only under a Government bill of lading to be furnished by that officer, in which case transportation charges must not be prepaid.

"5. The conditions appearing on the reverse side hereon are made a part of this order.

"Reference: P and C letter 30 July, 1918, File 46231/BC; P and C letter 21 Aug., 1918, File 47365/18C; Approp. Prov. Navy 1919-20.

[fol. 30] "30,000 Plugs 'Star' Brand Chewing Tobacco. Each plug to weigh 16 ounces. 150,000 Tins 'Velvet' Brand Smoking Tobacco, packed 2 ounces net per tin. 287,500 Packages 'Chesterfield' Brand Cigarettes, packed 20 cigarettes per package. 1,000,000 Packages 'Piedmont' Brand Cigarettes, packed 16 cigarettes per package. 800,000 Packages 'Fatima' Brand Cigarettes, packed 16 cigarettes per package.

"These quantities are the estimated Navy requirements for period to 1 December, 1918. The Navy does not guarantee to purchase the above-stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above-stated period. Shipment will be made only on receipt of an order from the Officer-in-Charge, Provisions & Clothing Depot, based on this Navy Order.

"It is further stipulated that any proportion of the Navy's requirements will be furnished Tax Paid or In

Bond, as directed by the Officer-in-Charge, Provisions & Clothing Depot.

“Domestic or Export Cases are to be supplied as ordered by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

“Inspection at point of delivery.

“Provisional Prices

“‘Star’ Brand Chewing Tobacco: Domestic Tax Paid, \$.49 net per plug, f. o. b. destination. In Bond, \$38 net per plug, f. o. b. factory.

“‘Velvet’ Brand Smoking Tobacco: Domestic Tax Paid, \$.09 net per tin, f. o. b. destination. In Bond, \$.075 net per tin, f. o. b. factory.

“‘Chesterfield’ Brand Cigarettes: Domestic Tax Paid, \$.09 net per package, f.o. b. destination. In Bond, \$.055 net per package, f. o. b. factory.

“‘Piedmont’ Brand Cigarettes: Domestic Tax Paid, \$.07 net per package, f. o. b. destination. In Bond, \$.04 net per package, f. o. b. factory.

“‘Fatima’ Brand Cigarettes: Domestic Tax Paid, \$.10 net per package, f. o. b. destination. In Bond, \$.07 net per package, f. o. b. factory.

“Domestic Tax Paid shipments to be made on prepaid Commercial Bills of Lading.

“In Bond shipments to be made on Commercial Bills of Lading, freight prepaid and added to the invoice as an additional item.

“War Tax exemption certificates will be furnished by the Officer-in-Charge and are to be used on all shipments.

“Payments will be made only by the Officer-in-Charge, Provisions & Clothing Depot, Brooklyn, N. Y.

“By direction of the Secretary of the Navy.

“Samuel McGowan, Paymaster General of the Navy.

“The above order is accepted subject to the conditions in subparagraph b above.

“Liggett & Myers Tobacco Co., by C. W. Toms, Vice-President.

“Witness: — — —.”

[fol. 31] On the reverse side of said printed form appeared extracts from the act of March 4, 1917, and the act of June 15, 1917, as follows:

“(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

“First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person.

“(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

“The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

“(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity

usually produced or capable of being produced by such person.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person.

"Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and [fol. 32] hereafter appropriated through such agency or agencies as he shall determine from time to time."

Following these extracts there was also on the reverse side of said printed form certain "conditions" with sub-headings, as follows:

"Specifications

"1. The article or articles furnished or services performed under this order must conform in all respects to the requirements of the specifications as indicated hereon, the "Conditions," and "Deliveries," contained herein. In any case where the specifications do not provide to the contrary, all workmanship and materials entering into the manufacture or construction of the material delivered must be of the very best quality and manufacture.

“Inspection

“2. The material delivered or service rendered shall be subject to inspection and examination by the officer or officers authorized by the Navy Department, and will not be accepted unless conforming in all respects to the requirements of the specifications. If the specifications direct inspection before shipment, the shipment must not be made until the material has been inspected and orders given for shipment by the inspection officer, unless specifically authorized by the bureau concerned.

“Address Correspondence

• • • • •

“Payments

“4. Upon presentation of the customary bills, deliveries or services will be inspected and vouchers covering same will be passed as soon as practicable—the Government reserving the right to make payments only when all the articles or services embraced in any one class or item, or the entire order, have been delivered or performed and accepted when such action is considered for its best interests.

“Patent Rights, etc.

• • • • •

“Consignments

• • • • •

“Tag Car

• • • • •

“Shipping Memoranda

• • • • •

“7. Each delivery must be accompanied by truckman's receipts, bills of lading, or shipping invoices, in duplicate, giving name of dealer, number of this order, and class, and a full statement of quantities, weights, packages, etc.

Duplicate dealers' bills, giving the same identifying information, including prices, etc., must also be rendered to the supply officer of the yard concerned prior to or at the time of each delivery.

"Deliveries

• • • • •

"Caution

• • • • •

[fol. 33]

"Rail Delivery

• • • • •

"Water Delivery

• • • • •

"Dray Delivery

• • • • •

"Yard Appliances

• • • • •

"Responsibility Prior to Acceptance

• • • • •

"Deliveries in Yard Hours

• • • • •

"Rejected Articles

• • • • •

"9. The above instructions and those on the opposite side must be carefully followed to avoid delay after delivery. If any matters are not understood, they may be referred to the Bureau of Supplies and Accounts for instructions."

The descriptions of the different kinds of tobacco and the provisional prices stated, following paragraph 5 of the

order, are upon a typewritten sheet pasted to and attached to the printed order.

IV

Upon receipt of the said order on or about August 31, 1918, plaintiff made indorsement thereon that the above order "is accepted, subject to the conditions in subparagraph b above," and returned the original of said order to the Bureau of Supplies and Accounts of the Navy Department.

On or about the 9th day of September, 1918, the Bureau of Supplies and Accounts by Samuel McGowan, Paymaster General of the Navy, addressed a letter to the plaintiff on the subject of modification of Navy order N-4128, to the effect that said Navy order be modified to include the paragraph: "Any orders issued by the Quartermaster, Marine Corps, Washington, D. C., for the brands of tobacco specified in this Navy order are to be executed and billed at the prices stated thereon. Shipping instructions will be issued and payment will be made by the Quartermaster, Marine Corps, Washington, D. C." This modification was received by plaintiff on September 12, 1918. On October 14, 1918, another modification of the original order was issued from the Bureau of Supplies and Accounts, addressed to plaintiff and duly received by it, in the form of a letter which stated that said Navy order was modified to provide for the delivery and acceptance of certain packages of cigarettes at stated provisional prices, namely "Fatima" brand cigarettes and "Piedmont" brand cigarettes, and that the modification would not have any bearing on the cigarettes already shipped in accordance with the original Navy order. The original of the letter was to be signed and returned to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C. At the bottom of said letter was written: "Navy order N-4128 is hereby accepted as modified above." This is signed by the plaintiff by its vice president and duly witnessed.

V

On or about the 22d of November, 1918, a further modification of Navy order N-4128 was issued out of the Bureau [fol. 34] of Supplies and Accounts, addressed to plaintiff,

stating that the said order was modified to provide for delivery of the following additional quantities of tobacco, more or less, as required during the period from December 1, 1918, to February 28, 1919, namely: 75,000 plugs "Star" chewing tobacco, 400,000 packages "Chesterfield" cigarettes, 2,000,000 packages "Piedmont" cigarettes, and 1,000,000 packages "Fatima" cigarettes, and adding: "The above quantities are estimated only and shipment is to be made only on receipt of order from Officer-in-Charge, Fleet Supply Base, South Brooklyn," and that all conditions stipulated in the original Navy order or any modification authorized heretofore were likewise applicable to this modification. It was requested that the original letter modifying this Navy order be signed and returned, and the same was returned as follows: "Navy order N-4128, as modified above, is hereby accepted." (Signed by the plaintiff by its vice president and witnessed.)

VI

The plaintiff furnished under said order and modifications thereof and delivered at various dates between and including September 9, 1918, and November 23, 1918, to the Navy Department, and between the dates of September 30, 1918, and November 22, 1918, delivered to the Marine Corps large quantities of the different brands of tobacco products called for by said order and modifications thereof, which, at the provisional prices stated in said order and modifications, amounted to the sum of \$423,893.96 and was paid at said prices for the same between the dates of September 9 and November 23, 1918. The prices at which the said tobacco products were invoiced by plaintiff when the shipments were made amounted in the aggregate to \$483,504.30, and said sum was the fair and reasonable value of said products. An itemized statement of the date of invoice, numbers and amount, appears in claimant's Exhibit E to its petition, which is here referred to and made a part of this finding by reference. The difference between the reasonable value of the said products and the amount that plaintiff has been paid therefor is the sum of \$59,610.34.

On or about the 20th day of February, 1919, plaintiff received a letter from the Navy Department canceling the

original Navy order N-4128 as modified, and no further orders or deliveries were made after that.

VII

On or about the 4th day of December, 1920, the Bureau of Supplies and Accounts addressed a communication to plaintiff, which received the same, as follows:

"Based on the Federal Trade Commission's report, and with the concurrence of the Army and Marine Corps, the Navy has established the following final prices for tobacco required under Navy Order N-4128, and this Navy Order is hereby modified to apply under the terms and conditions of subparagraph A thereon, sub-paragraph B being eliminated. (Here follows names of the different tobacco products and the final price.)

"The above final prices are all f. o. b. factory. For any shipment on which freight was paid by the company, credit for the actual amount will be allowed by the Navy on pre-[fol. 35] entation of properly substantiated invoices. These final prices have been determined on a basis of cost plus a reasonable return on investment. In determining costs, the cost of leaf tobacco has been computed at the average price of stock on hand, all selling expense and various minor items, such as donations, excess profits taxes, etc., being eliminated. Profit on the above cost of production has been allowed to permit of a return of 10 per cent on capital investment, including common and preferred stock but eliminating outside investments and intangibles, such as good will, etc.

"On this basis the records of the Navy show the account of the Liggett & Myers Tobacco Company under this Navy Order to stand as follows: [Here follows an itemized statement of the quantity delivered to the Navy and Marine Corps, provisional price paid, total amount paid, price now fixed, and total; these figures result in a balance due the Navy of about \$5,000.]

"If the deliveries stated in above tabulation do not agree with deliveries shown by the company's records, it is requested that the Navy be advised in order that all questions of fact in this respect may be reconciled.

"From the amount of \$4,968.44, which is the amount due the Navy on deliveries made to the Navy less the

amount due the company on deliveries made to the Marine Corps, is to be deducted any freight prepaid by the company. Check for the balance should be mailed to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C. together with the original of this letter signed as satisfactory or not satisfactory in the spaces provided below.

"If the final prices herein fixed as just compensation are not satisfactory, claim should be made for the additional amount desired in the manner prescribed by law as quoted in the original Navy order."

VIII

On the receipt of this letter the plaintiff addressed a letter to the Paymaster General of the Navy under date of December 7, 1920, as follows:

"We beg to acknowledge receipt of your letter of December 4—Subject Final Price Determination, Reference Navy Order N-4128, dated August 26, 1918.

"The settlement which you propose on account of our claim against the Navy Department for the balance due us is unsatisfactory, and cannot be accepted.

"We should be pleased for you to send us at your earliest convenience a statement in detail, giving the costs of each brand and each style of packing as determined by you, and also your method of determining the profit on each brand and each style of packing. Your prompt attention will be greatly appreciated."

Conclusion of Law

Upon the foregoing special findings of fact, which are included in the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$59,610.34.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of fifty-nine thousand six hundred ten dollars and thirty-four cents (\$59,610.34).

[fol. 36]

OPINION

CAMPBELL, Chief Justice, delivered the opinion of the court:

It is conceded by the Government that the plaintiff is entitled to payment for its tobacco products at the prices stated in its invoices of the same after crediting payments already made, although they are larger than the provisional prices stated in the Navy order. The one question for decision is whether plaintiff is entitled to interest upon this balance, admittedly due. The plaintiff contends that it should "recover interest as a part of the measure of just compensation guaranteed by the fifth amendment," because it claims that its tobacco products were taken or requisitioned in virtue of the act of March 4, 1917, 39 Stat. 1193, and the act of June 15, 1917, 40 Stat. 182.

It is to be observed at the outset that the statute, section 177, Judicial Code, provides that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims unless upon a contract expressly stipulating for the payment of interest. Amendments to this section authorize the allowance of interest in judgments for taxes erroneously or illegally assessed or collected. Revenue act of 1921, 42 Stat. 316. A claim for interest was accordingly denied where property was taken by the United States without the institution of condemnation proceedings. See *North American Transportation & Trading Co. case*, 253 U. S. 330. The taking in such case implies a promise to pay and the right of action in this court is based upon this implied contract, *Great Falls Mfg. Co. case*, 112 U. S. 645, but is not founded on the fifth amendment. *North American Transp. Co. case*, supra; *Klebe case*, 263 U. S. 188, 191. Nor is it to be overlooked that the liability of the United States for interest is not merely limited by section 177, but does not exist at all in the absence of statutory authority to allow interest, unless an exception is to be found in cases to be referred to later on.

It is settled upon grounds of public convenience that "interest is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers." See *United States v. North Carolina*, 136 U.

S. 211, 216; *Sherman case*, 98 U. S. 565, 567; *Angarica v. Bayard*, 127 U. S. 251, 260. This common-law rule exempting the United States from liability for interest has been adopted by Congress in section 177, Judicial Code. See *North American Transportation & Trading Co. case*, *supra* (p. 336). In consenting that the Government may be sued in the Court of Claims the Congress can place such conditions as it sees fit upon the exercise of the privilege or upon the authority of the court. A party availing himself of it accepts all the terms and limitations of the statute that authorizes the suit. *McElrath case*, 102 U. S. 426, 440. If even purely formal conditions be attached to the Government's consent to be sued those conditions must be complied with. *Rock Island, Arkansas & Louisiana Railroad Co. case*, 254 U. S. 141, 143; 54 C. Cls. 22. This section 177 is taken from the act of March 3, 1863, 12 Stat. 765, which is the first act conferring power on the Court of Claims to render final judgments from which appeals would lie. Prior to that time the original act establishing the court (act of February [fol. 37] 24, 1855, 10 Stat. 612) had conferred power to hear and determine claims and report its action to Congress.

Provision is made in the act of March 3, 1863, for interest upon judgments appealed from by the Government and affirmed by the Supreme Court of the United States, and then follows a proviso in section 7 of the act to the effect that no interest shall be allowed on any claim up to the time of the rendition of judgment "unless the contract expressly stipulates for the payment of interest." It thus appears that the same act which authorized judgments and appeals excludes in terms any right to include interest in the judgment, and therefore that not only does the general rule of law prevent the allowance of interest against the United States, but the statute conferring power to render judgments forbids such allowance where interest is not expressly stipulated for in the contract. But there are provisions in a number of statutes enacted during the period of the World War conferring jurisdiction upon this court to ascertain the value of property taken by the Government where the owner is dissatisfied with the action of the President or other authorized agency designated to determine the just compensation which the statutes in such cases declare shall be made to the owner.

In action brought here in virtue of these acts the rule of law and section 177 adverted to are not applicable. They come here and the court proceeds in them because of the particular statute under which the property is authorized to be taken and by which provision is made for the determination of just compensation. In that class of cases "the owner's right does not depend on contract, express or implied." *Seaboard Air Line Ry. case*, 261 U. S. 299, 304. The suit in this court is a part of the authorized procedure initiated by the United States for the condemnation of the property. See *Seaboard Air Line Ry. case*, *supra*. In the case just cited it appeared that the property was taken under section 10 of the Lever Act, and it was therefore not within the jurisdiction of the Court of Claims. But in the later case of *Brooks-Scanlon Corporation*, 265 U. S. 106, appealed from this court the claim was predicated upon a requisition or taking, exercised under the act of June 15, 1917, 40 Stat. 182, which directs that just compensation shall be made, to be determined by the President or by some agency to whom he may delegate the power. If the amount so determined by the President is unsatisfactory to the person entitled to receive the same the act provides that such person is to be paid 75 per cent of the amount so determined and "shall be entitled to sue the United States to recover such further sum as added to said 75 per cent will make up such amount as will be just compensation therefor in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code." Adopting the rule laid down in the *Seaboard Air Line Ry. case* upon the question of interest the court in this *Brooks-Scanlon Corp. case*, say: "And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added."

When in conformity to the statute suit is brought in the Court of Claims by a party dissatisfied with the President's determination the court is to ascertain the "just compensation" which the party entitled should receive. There is nothing in the act which forbids the President taking account of the delay in payment and finding that the owner should be allowed such additional sum as will produce the full equivalent of such value paid contemporaneously, and

the suit authorized in this court being a part of the plan for awarding this just compensation is in effect a continuation of the proceeding initiated by the United States for the condemnation of the property. See *Seaboard Air Line Ry. case*, *supra*. To read into the act authorizing this procedure the provision of section 177 might be to impair the very purpose of the act—the securing of just compensation to the person whose property has been taken. While the court is not authorized to include interest on its judgments in the cases coming under its general jurisdiction, it is authorized to include interest in cases brought here properly as part of the procedure for condemnation initiated by the Government. *Brooks-Scanlon Corp. case*, *supra*.

In the instant case there was no taking or requisition by the Government of plaintiff's property. The so-called requisition order was nothing more than an offer by the Navy Department to buy tobacco products to be manufactured and delivered at subsequent dates, which order was accepted by the plaintiff. Certain unit prices were stated in the order as being those that would be paid until by a later determination a reasonable and just price would be determined upon, the plaintiff in any event being "assured of a reasonable profit under this order." The products were furnished and the plaintiff was systematically paid these unit prices. It invoiced the goods at a different price, which produces the difference here sued for and to which admittedly it is entitled as being the fair and reasonable value of the tobaccos delivered. Plaintiff, however, now claims interest in addition to this principal sum. In identically the same kind of cases no interest has been allowed. See *R. J. Reynolds Tobacco Co. case*, 60 C. Cls. 328. *American Tobacco Co. case*, 58 C. Cls. 717. Plaintiff's right to sue in this case must be based upon section 145, Judicial Code, and the court can not ignore the statute already adverted to, which forbids the allowance of interest.

The facts furnish no support for the contention that the tobacco products were requisitioned or that the order in question was obligatory. If it had been obligatory there was no necessity for its acceptance. *American Smelting Co. case*, 259 U. S. 75, 79; 55 C. Cls. 466, 471. But it was accepted, and thereby the plaintiff expressly contracted to furnish the products ordered at a price which would later

be determined—not alone by the paymaster of the Navy, but by agreement if the parties should agree. Upon their failure to agree the right to sue upon the contract is given by section 145. See Federal Sugar Ref. Co. case, 60 C. Cls. 184, 197; Herrman case, 57 C. Cls. 96; Consolidation Coal Co. case, 60 C. Cls. 608, 621; Bogert case, 2 C. Cls. 159. The order states that pursuant to the provisions of the naval appropriation act of March 4, 1917, and the urgent deficiency act of June 15, 1917, and “acting under the direction of the President” it is placed with plaintiff “under the conditions stated in subparagraph (b)” and that compliance with the order is obligatory. It speaks of “material” needed by the Navy, but manifestly the order can not extend the authority conferred by the acts mentioned. It does not appear in this case that the President assigned his powers under the act of June 15, but we know [fol. 39] from other cases that he did authorize the Secretary of the Navy to act. Assuming, for the purposes of this case, such authority in the secretary, it by no means follows that the great powers conferred by these acts were extended to the paymaster of the Navy and by him to orders issued by the quartermaster, Marine Corps, as the original order or one of its modifications directs.

It is to be observed that the act of March 4, 1917, 39 Stat. 1192, defines the “war material” concerning which an order could be placed and likewise provides the course that may be pursued in case of refusal or failure to comply with the authorized order. This at least implies that the order could be refused, in which case the President could take possession of the “factory” or any part of it and use the same for the production of the ships or war material. Subparagraph “fourth” authorizing the requisition or taking over for use by the Government of any factory or part of it is limited to the period ending March 1, 1918. This act does not contain the provision that does appear in the act of June 15, 1917, whereby the President may exercise the power and authority thereby vested in him through such agency or agencies as he should determine from time to time. 40 Stat. 183. There is a provision in the act of March 4 that where “war material” is requisitioned or taken over, the President shall determine just compensation for it, and if the party entitled be dissatisfied with the amount so determined he shall be paid 50 per cent of the amount so

determined by the President and can sue for an additional sum in the Court of Claims. But the order in question does not proceed upon the theory of the payment of 50 per cent when determined, nor of 75 per cent as mentioned in the act of June 15. It proceeds upon the theory of the payment of a stated provisional price which might have been accepted and been acceptable to both parties. As a matter of fact the plaintiff was paid as and when deliveries were made largely more than 75 per cent of the invoice prices upon which its bills were based.

If there were reasonably some question as to whether the order should be treated as a requisition or the taking of property of the citizen on the one hand, or a contract for its purchase on the other hand, it would seem that it should be treated as a contract because the Government is not to be presumed to exercise the harsher method of eminent domain when the same results can be gained by the ordinary methods of contract. *Bogert's case*, 2 C. Cls. 160, 164. It would be going much farther than the court feels justified in going to hold that an order for tobacco products to be made and delivered in the future is a taking or a requisition of such products. It remains to be said, in view of the references to it in plaintiff's brief, that the facts as stated in the findings in the *American Tobacco Co. case*, *supra*, were stipulated. No question arose as to interest and it was conceded that the court should determine the amount due for the tobaccos furnished. When, however, the court is asked to make findings or deductions as a basis for a liability that may not exist it requires evidence of the essential facts and does not feel bound by stipulated deductions in the absence of proof.

The court will give judgment for the fair and reasonable value of the tobacco products, but will not allow interest. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 40] V. JUDGMENT—February 15, 1926

At a Court of Claims held in the City of Washington on the 15th day of February, A. D., 1926, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Fifty-nine thousand six hundred and ten dollars and thirty-four cents (\$59,610.34).

By the Court.

[fol. 41] Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 31,893. Court of Claims. Term No. 1170. Liggett & Myers Tobacco Company, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed May 3rd, 1926. File No. 31,893.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1926

No. 362

LIGGETT AND MYERS TOBACCO COMPANY, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 11, 1926

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3229)

